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In the Supreme Court of the United States.

OCTOBER TERM, 1919.

THE UNITED STATES OF AMERICA, APPELLANT,
v.
THE DIAMOND COAL AND COKE COMPANY. } No. 338.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT.

The appeal in this case (R. 32) is from a judgment of the Circuit Court of Appeals for the Eighth Circuit which affirmed a judgment of the United States District Court for the District of Wyoming dismissing, upon defendant's motion, a bill brought by the United States to secure the cancellation of eighteen patents issued under the coal land laws to various individuals.

The theory and basis of the Government's bill (R. 1 to 12) were that these patents had been obtained by fraud, the result of a conspiracy between the defendant company and the various individuals whereby it was agreed that each of the latter would make an entry for a specified tract of the lands involved, ostensibly for his own use and benefit but in reality for the use and benefit of the Diamond Coal and Coke Company, in whose interest and at whose instigation such entrymen were acting at all times

in the proceedings before the Land Department The ultimate purpose of the conspiracy was to vest in the defendant company the title to lands it was not lawfully entitled to take under the coal land laws because of the limitation of the acreage for which entry could be made or patent secured by an individual or corporation.

The patents involved had been issued from twelve to twenty-one years when the bill of complaint was filed in this case. In view of the provision of Section 8 of the Act of March 3, 1891 (26 Stat. 1095, 1099), barring suits by the Government to cancel patents after the expiration of six years from their issuance, and in order to take the case out of that statute, the bill averred the fact that it was a part of the conspiracy that the fraud practiced upon the Land Department should be and was kept concealed, and that the plaintiff was without knowledge and in ignorance of the fraud until November, 1916, when a report of the special agent of the General Land Office was filed in that office, since when, at all times the plaintiff has been diligently prosecuting the work of ascertaining the facts and in preparing and instituting appropriate judicial proceedings to enforce its rights.

The defendant filed a motion to dismiss (R. 14), and thus challenged the sufficiency of the bill upon three grounds, which, summarized, are:

1. That the bill did not state a cause of action and did not set forth facts entitling the plaintiff to relief against the defendant.

2. That the statute of limitations barred the suit, and the bill failed to state facts excusing the failure to bring the suit within six years from the issuance of the patents; and

3. Laches.

The District Court, as appears from its memorandum of opinion (R. 22), sustained this motion upon the second and third grounds. The plaintiff elected to stand upon its bill, and took an appeal to the Circuit Court of Appeals which affirmed the judgment of the District Court. Opinion of District Court, R. 22 to 24; Circuit Court of Appeals, R. 26 to 31; 254 Fed. 266.

ASSIGNMENT OF ERRORS.

The assignment of errors (R. 33) is as follows:

That said United States Circuit Court of Appeals for the Eighth Circuit erred in affirming the decree heretofore entered in said case by the United States District Court of Wyoming, to wit:

1. That said court erred in affirming the action of said District Court for the District of Wyoming in sustaining the motion of the appellee, The Diamond Coal and Coke Company, to dismiss the bill of complaint herein.

2. That said court erred in affirming the action of the District Court for the District of Wyoming in making and entering a decree against the appellant and in favor of the appellee, dismissing the bill of complaint herein.

ARGUMENT.

I.

THE BILL PLEADS SUFFICIENT FACTS TO AVOID THE BAR OF THE STATUTE OF LIMITATIONS.

The averments of the bill of complaint on the point of lack of knowledge of the fraud, when notice was first received, of what it consisted, and diligence in acting upon it, are (R. 8):

> That all of said entries and purchases were made by the procurement of said defendant, acting through said conspirators, acting in a secret and hidden manner with the purpose of preventing the plaintiff and its officers of the Land Department from knowing or learning of the agreements and understanding existing between said defendant and said entrymen, and with an understanding between said entrymen and all of the parties to said transactions that the true facts relating to said transactions should be concealed from the knowledge of the officers of the United States whose duty it was to decide whether such entries and purchases should be accepted and approved and patents issued thereunder, and that at all times herein mentioned and at all times thereafter said conspirators and said entrymen unlawfully, fraudulently and wickedly concealed from the plaintiff and from the officers of the plaintiff having authority in the premises the true facts and circumstances under which said entries and purchases were made.
>
> That said representations, affidavits and statements aforesaid constituted the only

evidence or means of information available to any of the officers of the United States having or exercising any authority in the matter of deciding whether said entries or purchases should be accepted, approved and patents issued thereunder.

Said officers of the said United States Land Office at Evanston, Wyoming, and the General Land Office at Washington, and the Interior Department charged with such matters, as aforesaid, were deceived and misled by said affidavits, entries and purchases as aforesaid, and by said fraudulent devices and appearances, and believed and relied upon said affidavits, entries and purchases, and believed that said entrymen were in possession of said lands as aforesaid and had developed coal mines thereon as aforesaid, and that said entries were made for the use and benefit of said entrymen respectively, and not directly or indirectly for the use or benefit of any other person or persons whomsoever, and were at all times in ignorance of said conspiracy, and of the aforesaid purpose and fraudulent character of said entries, and because of such belief, reliance and ignorance, and not otherwise, caused the said entries to be allowed, * * * .

* * * * *

(R. 10, 11):

That at all times said conspirators and said entrymen and said defendant fraudulently, unlawfully and dishonestly concealed from the aforesaid officers of the United States having authority in the premises the afore-

said fraudulent practices and the true circumstances under which said entries and purchases were made, as aforesaid, all of which has at all times been well known to and taken advantage of by said defendant; that said several frauds, fraudulent devices and misrepresentations aforesaid were known only to said conspirators and said defendant, and were perpetrated secretly and were of such a nature as to conceal themselves.

That neither the plaintiff nor any officer of the United States having authority in the premises ever had any knowledge or information concerning the frauds perpetrated upon plaintiff, as aforesaid, except that on or about the month of November, 1916, there was filed in the General Land Office of the United States at Washington, D. C., a report upon said entries by one John A. Smith, Special Agent of the Department of the Interior; that immediately thereupon and at all times thereafter the Department of the Interior of the United States and the Department of Justice of the United States have been engaged in the continuous and diligent prosecution of the work of investigating and ascertaining the true facts in the premises and in preparing and instituting appropriate judicial proceedings to enforce the rights and remedies of the plaintiff in the premises.

The point upon which the case was decided by both the District Court and the Circuit Court of Appeals was, as stated by the latter (R. 29; 254 Fed. 269):

> Has the plaintiff averred in its bill of complaint facts which show that it exercised reasonable care and diligence to discover the fraud, that it had no means of knowledge thereof, no notice sufficient to put it on its guard and call for inquiry, and has it alleged the time when the fraud was discovered, the circumstances of its discovery, what the discovery was, and why it was not made before so that the court may clearly see that the discovery could not have been made before by the exercise of ordinary diligence?

In determining this question both courts below rested their decision mainly on the case of *Wood* v. *Carpenter*, 101 U. S. 135, where this court used the following language (pp. 140, 141):

> In this class of cases the plaintiff is held to stringent rules of pleading and evidence, "and especially must there be distinct averments as to the time when the fraud, mistake, concealment, or misrepresentation was discovered, and what the discovery is, so that the court may clearly see whether, by ordinary diligence, the discovery might not have been before made." *Stearns* v. *Page*, 7 How. 819, 829.
>
> * * * * *
>
> A general allegation of ignorance at one time and of knowledge at another are of no effect. If the plaintiff made any particular discovery, it should be stated when it was made, what it was, how it was made, and why it was not made sooner. *Carr* v. *Hilton*, 1 Curt. C. C. 220.
>
> * * * * *

> A party seeking to avoid the bar of the statute on account of fraud must aver and show that he used due diligence to detect it, and if he had the means of discovery in his power, he will be held to have known it. *Buckner & Stanton* v. *Calcote*, 28 Miss. 432, 434. See also *Nudd* v. *Hamblin*, 8 Allen (Mass.), 130.

Under this rule the Circuit Court of Appeals held the complaint insufficient because it contained—

> no averments of any impediments to an earlier prosecution of the plaintiff's claim other than the immaterial fact that it was ignorant of its claim in 1903 and aware of it in 1916, * * * no allegation of any means used by the coal company after the completion of the fraud in 1903 to keep the plaintiff in ignorance of it, * * * nothing to show why the fraud could not have been discovered and the suit brought as well at any time after 1903 and prior to 1915 as after the latter date, * * * no material averment in it of how and when the plaintiff first came to a knowledge of the matters alleged in the bill. The averment on that subject fails to state any pertinent or material fact except that the plaintiff and all its officers having authority in the premises were ignorant of the fraud until and except that in November, 1916, a special agent of the Interior Department filed a report on the entries, * * * no statement of the facts this report revealed, of who discovered them, when they were discovered or how or why the special agent made the report, or of any other

material facts tending to show that the knowledge of the fraud could not have been discovered as well in 1904 as in 1916. R. 31; 254 Fed. 271.

(a) *The rule laid down in Wood v. Carpenter is not applicable to the instant case; a clear distinction exists between it and those cases in which the rule of Wood v. Carpenter has been applied, and this distinction has been recognized by the decisions of this court.*

Let us examine the cases cited by the Circuit Court of Appeals upon which it based its ruling as to the insufficiency of the bill of complaint, and also other cases decided in this court in which *Wood* v. *Carpenter* is cited as authority.

It will be found that in each of them there was some notice, some circumstance, some proceeding, some instrument of record which made the plaintiff chargeable with knowledge or which should have put him on inquiry, and in view of which, failure to act was held to be fatal.

In *Badger* v. *Badger*, 2 Wall. 87, the bill attacked as fraudulent an account rendered by the administrator of an estate, by virtue of which authority was secured for the sale of real estate to pay the balance due for expenditures made; the land had been sold beneath its value and bought in for the defendant, one of the administrators; but before the sale the defendant had silenced objections of some of the heirs by purchasing their shares and

had fraudulently procured the signature of the mother and in this way had secured the court's consent to the sale. This court found that for more than twenty-five years the widow and heirs had acquiesced in the sale; the transaction was public and well known to the heirs and their guardian; no concealment was possible, and none was attempted.

Wood v. *Carpenter*, 101 U. S. 135, was a *suit at law*, wherein this court construed a statute of the State of Indiana and followed the adjudication of the courts of that State.

It appeared that Wood, the plaintiff, had secured judgments against Carpenter in 1860. The latter, to defraud Wood, conspired with several others to encumber and dispose of his property; he confessed several judgments for large sums and then made an assignment of all his property to his brother and others, who held it in secret trust for him. Thus Wood was prevented from levying executions. In 1862 Wood, in order to compel Carpenter to pay his judgments, had him arrested in Massachusetts upon final process, but he took the insolvent debtor's oath, swearing falsely that he had in good faith assigned all his property for the benefit of his creditors. Thereafter, Carpenter induced Wood to assign his judgments for fifty per cent of their value. Within twelve months before suit most of the property of Carpenter was reconveyed to him. Although plaintiff had no actual knowledge of the ownership of the property by defendant, nor of the trust,

nor of the falsity of the representations until 1872, when suit was brought, he did have constructive notice thereof.

The court said (pp. 139, 140):

> It will be observed also that there is no averment that during the long period over which the transactions referred to extended, the plaintiff ever made or caused to be made the slightest inquiry in relation to either of them. The judgments confessed were of record, and he knew it. It could not have been difficult to ascertain, if the facts were so, that they were shams. The conveyances to Alvin and Keller were also on record in the proper offices. If they were in trust for the defendant, as alleged, proper diligence could not have failed to find a clew in every case that would have led to evidence not to be resisted. With the strongest motives to action, the plaintiff was supine. If underlying frauds existed, as he alleges, he did nothing to unearth them. It was his duty to make the effort. It should be borne in mind that when the judgments were assigned to Keller the country was in the throes of the civil war. Lee had not surrendered. Gold and silver, in the currency of the time, were at a high premium. All real property was largely depreciated. The future was uncertain. A transaction which then seemed wise and fortunate, a year later might be deemed greatly otherwise. It is hard to avoid the conviction that the plaintiff's conduct marks the difference between forethought in one condition of things and afterthought in another.

Wollensak v. *Reiher*, 115 U. S. 96, was a suit to restrain alleged infringement of reissued letters patent issued to complainant. It appears that the original patent did not sufficiently cover the complainant's invention, hence the reissuance was sought. Defendant was not charged with infringement of the first patent but with the reissued one, which expanded the claims covered by the first. The application for reissue was not made until after five years from the date of the first patent. It was held, that inasmuch as an inspection of the patent would have disclosed that it did not fully cover the invention, complainant was thus put on notice, should have acted immediately to secure the reissue, and his delay was such as to make him guilty of laches.

In *Boone County* v. *Burlington etc. R. R.*, 139 U. S. 684, the decree, involving certain lands, which was sought to be set aside as fraudulent, had been of record for more than four years, the period of limitation under the Nebraska statute. There was no allegation of ignorance of the facts after the decree was entered, nor any allegation or proof that the County Board was under hostile control down to a period within four years of the filing of the bill. There was no averment as to the time when the fraud was discovered. Further, a large portion of the lands involved had been sold to bona fide purchasers who bought on the strength of the alleged fraudulent decree.

Felix v. *Patrick*, 145 U. S. 317, was a case where a conveyance of scrip had been obtained from an

Indian woman and her husband in 1860. It was located upon lands which, when suit was brought, were in the limits of the city of Omaha, Nebraska. Neither Felix, the Indian woman, who lived until 1865, nor her husband, who lived until 1882, had made any effort to learn what disposition had been made of this scrip or upon what lands it had been located, although those were matters of public record. The property had greatly increased in value, and suit was not brought until 1888.

In *Ware* v. *Galveston City Co.*, 146 U. S. 102, plaintiff averred that the first knowledge of alleged fraud was shortly prior to 1881, but the fact was that in 1843 an agent had been sent to investigate the transaction, and had obtained information which imposed the duty to make further inquiry. More than 35 years elapsed before suit was brought.

In the case of *Johnston* v. *Standard Mining Co.*, 148 U. S. 360, the court found that although plaintiff had knowledge of facts sufficient to put him on inquiry in 1881, no action was taken by him until 1885, when he filed a suit which was dismissed after about a year. A second suit was instituted and dismissed, and then the suit under consideration was brought in 1887. The property was mining property, the value of which had greatly enhanced in the meantime.

Pearsall v. *Smith*, 149 U. S. 231, was a suit in equity in the nature of a creditor's bill by the assignee in bankruptcy to set aside as in fraud of creditors several transfers of property to the defendant made

in 1874. The bill was filed in 1886. The court found that eleven years before the bringing of this suit all facts constituting fraud had been discovered by one of the creditors under whom the plaintiff claimed and that such creditor, appearing by the same attorney as the one who represented the assignee in bankruptcy in the pending suit, had filed a suit in 1875 against the same defendants to set aside the same conveyances on the same grounds.

The case of *Bates* v. *Preble*, 151 U. S. 149, was an action at law to recover the value of certain securities alleged to have been converted by the defendant, and the Massachusetts statute of limitations was invoked. The decisions of the courts of that State on the statute of limitations were followed, the case being decided on the authority of those cases. *Wood* v. *Carpenter* was not relied upon as a basis of the decision; it was merely cited without comment.

The bill in the case of *Hardt* v. *Heidweyer*, 152 U. S. 547, sought to set aside as void certain preferences of a bankrupt firm, particularly some judgment notes upon which judgment had been confessed. The court found that there was no want of knowledge on the part of the plaintiffs of certain of the transactions, and as to certain alleged concealed wrongs held that there was available information which should have put them on inquiry or have caused an examination into the transactions.

The case of *Kinder* v. *Scharff*, 231 U. S. 517, is a more recent decision of this court in which *Wood*

v. *Carpenter* is cited, and involved the application of the statute of limitations in the bankruptcy act. The court found that the plaintiff was chargeable with knowledge of fraud if there was fraud. It appeared that during the pendency of the original bankruptcy proceedings the trustee suspected the fraud, made some inquiries, but dropped the matter because he thought it was not worth while. He "voluntarily abstained from availing himself of the means put in his hand by the law itself for the ascertainment of a suspected fact" by examining the bankrupt, and otherwise.

The conclusion which must be arrived at from the analysis of these cases, and many others in this court which might be cited, is well expressed in the decision in *Galliher* v. *Cadwell*, 145 U. S. 368, where, speaking of the defense of laches, it was said (p. 372):

> The cases are many in which this defence has been invoked and considered. It is true, that by reason of their differences of fact no one case becomes an exact precedent for another, yet a uniform principle pervades them all. They proceed on the assumption that the party to whom laches is imputed *has knowledge of his rights, and an ample opportunity to establish them in the proper forum;* that by reason of his delay the adverse party has good reason to believe that the alleged rights are worthless, or have been abandoned; and that because of the change in condition or relations during this period

> of delay, it would be an injustice to the latter to permit him to now assert them. (Italics ours.)

The flexibility of the doctrine of laches is one of its important elements. As was said in *Hammond* v. *Hopkins*, 143 U. S. 224, 250:

> Each case must necessarily be governed by its own circumstances, since, though the lapse of a few years may be sufficient to defeat the action in one case, a longer period may be held requisite in another, dependent upon the situation of the parties, *the extent of their knowledge or means of information, great changes in values, the want of probable grounds for the imputation of intentional fraud, the destruction of specific testimony, the absence of any reasonable impediment or hindrance to the assertion of the alleged rights, and the like. Marsh* v. *Whitmore*, 21 Wall. 178; *Landsdale* v. *Smith*, 106 U. S. 391; *Norris* v. *Haggin*, 136 U. S. 386; *Mackall* v. *Casilear*, 137 U. S. 556; *Hanner* v. *Moulton*, 138 U. S. 486. (Italics ours.)

And in the same case, the line of demarcation in applying this doctrine was set forth as follows (p. 274):

> In all cases where actual fraud is not made out, but the imputation rests upon conjecture, where the seal of death has closed the lips of those whose character is involved, and lapse of time has impaired the recollection of transactions and obscured their details, the welfare of society demands the rigid enforcement of the rule of diligence. The hourglass

> must supply the ravages of the scythe, and those who have slept upon their rights must be remitted to the repose from which they should not have been aroused.

The courts below overlooked these important distinctions and applied the doctrine of laches without consideration of the want of notice to the plaintiff of the fraud perpetrated by the defendant. It is urged that occupation of the land by the defendant constituted notice, but as we shall presently show, that fact alone imparted no notice or even suspicion of fraud.

The case at bar is clearly not governed by the decision in *Wood* v. *Carpenter*. It is entirely different in its essential aspects. This court has never applied the rule of that and kindred cases to a case where gross fraud was clearly made out and where the delay in bringing suit was due to concealment.

This disposition of the court is well indicated by the following excerpt from the opinion in *Felix* v. *Patrick*, *supra*, where, although relief was denied because of apparent laches in the face of circumstances which should have been acted upon, and if acted upon would have disclosed the true situation, it was said (p. 334):

> If there had been a deliberate attempt on his part by knavish practices to beguile or wheedle her out of these lands, we should have been strongly inclined to afford the plaintiffs relief at any time during the life of either of the parties; but, as the case stands at present, justice requires only what the law, in the

absence of the statutory limitation would demand—the repayment of the value of the scrip with legal interest thereon.

Were anything further needed to demonstrate this proposition, it is supplied by the decision in *McIntire* v. *Pryor*, 173 U. S. 38. In that case a bill was brought to set aside and avoid, upon the ground of fraud, a certain foreclosure of real estate in the District of Columbia. The fraud was well established, but the sale under the foreclosure was made in 1881 and the bill was not filed until 1890. Plaintiff's theory, however, was that the sale was made in her interest and there was nothing definite to apprise her to the contrary until the fall of 1886 when building operations upon the tract were begun. Upon the question of laches this court referred to the fact that the position of the property and the parties had not materially changed, nor the property greatly increased in value, and that no rights of bona fide purchasers had intervened. The opinion then proceeds (p. 54):

> We have no desire to qualify in any way the long line of cases in this court, too numerous even for citation, in which we have held that where the fraud is constructive, or is proved by inconclusive testimony, or by evidence falling short of conviction, and the property has greatly increased in value, great diligence will be required in the assertion of the plaintiff's rights. But these were all cases either of bills to establish a trust, to open settled accounts, bills not involving fraud, or

> where the fraud was not clearly proven, or where, with knowledge of the facts, the fraud had been deliberately acquiesced in, bills to impeach judicial proceedings, or where the property had passed into the hands of persons innocent of the fraud, or with no actual notice that a fraud had been committed.
>
> Granting all that may be fairly claimed of these cases, there is another class having a different bearing, in which it has been held that in case of actual fraud a delay, even greater than that permitted by the statute of limitations, is not fatal to the plaintiff's claim.

A review of a number of cases follows the above quotation and after distinguishing them, this statement is made (p. 59):

> We do not wish to be understood as holding that the plaintiff, even in the case of actual fraud, may wait an indefinite time, or always so long as the statute of limitations would permit him to bring an action at law before asserting his rights; but where the fraud is clearly proven, the court will look with much more indulgence upon any disability under which the plaintiff may labor as excusing his delay.

(*b*) *The sufficiency of the bill is fully sustained by the decision in Rosenthal v. Walker, 111 U. S. 185, and other decisions of this court.*

The suit in that case was brought to recover from Rosenthal certain money paid and property sold to him by one Carney in fraud, as was alleged, of the

bankrupt act. It appeared that Carney was insolvent and in contemplation thereof, as Rosenthal had cause to believe, and with intent to defeat the operation of the bankrupt law, as Rosenthal well knew, paid the latter $30,000, and sold and transferred certain goods under an agreement between them that Carney should have an equal interest in the goods with Rosenthal. Regarding the concealment of the fraud and its discovery, the petition made this statement (p. 187):

> The plaintiff states that both the said Carney and the defendant kept concealed from him, the said plaintiff, the fact of the said payment and transfer of the said aggregate sum of $30,000, hereinbefore mentioned, and of all the component parts thereof; and also kept concealed from him the fact of the sale, transfer, and conveyance of the said goods and merchandise hereinafter set forth, and that he, the said plaintiff, did not obtain knowledge and information of the said matters, or either of them, until the 29th day of November, 1879, and then for the first time the said matters were disclosed to him and brought to his knowledge.

The court stated the first question to be: "Whether the averments of the petition excuse the failure to bring the suit within two years after the cause of action accrued." It was held that the judgment of the Circuit Court that these averments excused the failure to bring the suit within two years after the cause of action accrued was sustained by the opinion

and decree of this court in the case of *Bailey* v. *Glover*, 21 Wall. 342, and the court said, p. 190:

> That case was a bill in equity filed by the complainant as assignee in bankruptcy of Glover, one of the defendants, to set aside a conveyance made by him of his property to defraud his creditors. The suit was brought more than two years after the appointment of the assignee. To excuse the delay and take the case out of the operation of the statue, the following averment was made: the bankrupt and the other defendants, to whom he had conveyed his property, "kept secret their fraudulent acts and endeavored to conceal them both from the knowledge of the assignee and his one creditor, whereby both were prevented from obtaining any sufficient knowledge or information thereof until within the last two years, and that even up to the present time they had not been able to obtain full and particular information as to the fraudulent disposition made by the bankrupt of a large part of his property." The court held that "as the bill contained a distinct allegation that the defendants kept secret and concealed from the parties interested the fraud which was sought to be redressed," the case was not subject to the bar of the statute. The court added: "To hold that by concealing a fraud, or by committing a fraud in a manner that it concealed itself until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure." The court

> also declared that the exception to the bar of the statute was applicable to suits at law as well as in equity.

The court distinguished *Rosenthal* v. *Walker* from *Wood* v. *Carpenter*, in the following language (pp. 190, 191):

> The plaintiff in error relies on the case of *Wood* v. *Carpenter*, 101 U. S. 135, and *National Bank* v. *Carpenter*, Id. 567. The first was an action at law, the second a suit in equity. The court in both cases was called on to construe a statute of limitations of the State of Indiana, and it followed the adjudications of the Supreme Court of that State upon the same statute. Neither case refers to the opinion of the court in *Bailey* v. *Glover*, or can be held to overrule or modify it. The case of *Bailey* v. *Glover* has been often cited by this court, but has never been doubted or qualified. *Wood* v. *Bailey*, 21 Wall. 640; *Wiswall* v. *Campbell*, 93 U. S. 347; *Gifford* v. *Helms*, 98 U. S. 248; *Upton* v. *McLaughlin*, 105 U. S. 640.

The case of *Traer* v. *Clews*, 115 U. S. 528, is a case in which no more specific allegations than in the instant case were sustained as sufficient. Clews brought the suit to recover the value of fifty shares of stock and the dividends declared thereon, which he had owned. He had been adjudicated a bankrupt, and this stock, with the dividends which had been declared thereon, had passed to his trustee, Tappan. Shortly afterwards, the company in which the stock was held went into dissolution and Traer

and others were appointed trustees. Traer knew that dividends had been declared on this stock, but this was unknown to Clews and his trustee. Traer, through the intervention of an agent, purchased of Tappan fifty shares of the stock. Later, Tappan assuming that the sale of the stock was void for fraud sold all claims and demands thereon to Clews. The allegations in that case as to concealment and when the fraud was made known were (p. 536):

> That as to the matters and things herein set forth as a cause of action against the said Alla D. Traer, the said fraudulent transactions with which she was connected and her part therein were studiously concealed from the plaintiff and his assignor, and he had no means of discovering the same, nor had his assignor any means of discovering the same until the same were disclosed upon the examination of John W. Traer, as witness in this action, on the 24th day of September, 1879; that the plaintiff and his assignor did not know of the said fraud and the fraudulent acts of the defendant, Alla D. Traer, until the same were made known on the said examination.

In its opinion, the court cited with approval the case of *Rosenthal* v. *Walker*, *supra*, and said (p. 538):

> So in the case of *Rosenthal* v. *Walker*, 111 U. S. 185, the plaintiff averred that "both the said Carney and the defendant kept concealed from him, the said plaintiff, the fact of the said payment and transfer of the aggregate sum of $30,000, * * * and the fact of the sale, transfer and conveyance of the said

> goods, * * * and that he, the said plaintiff, did not obtain knowledge and information of said matter until the 29th day of November, 1879, and then, for the first time, the said matters were disclosed to him, and brought to his knowledge." p. 187. These averments were held sufficient on exception to the petition to take the case out of the bar prescribed by Sec. 5057 of the Revised Statutes. The case of *Bailey* v. *Glover*, has never been overruled, doubted, or modified by this court. On the contrary, in *Rosenthal* v. *Walker*, it was reaffirmed, and was distinguished from the case of *Wood* v. *Carpenter*, 101 U. S. 135, relied on by the appellants. The authorities cited are in point and fully support our conclusion that, upon the pleadings and evidence the suit of the plaintiff was not barred by the limitation prescribed by Sec. 5057 of the Revised Statutes.

The doctrine of *Bailey* v. *Glover* was recently reaffirmed by this court in *Exploration Co.* v. *United States*, 247 U. S. 435, and declared to be the true rule of federal jurisprudence in the application of statutes of limitation.

If the distinction which we have endeavored to point out does not exist between cases where there was notice of the fraud, or where the fraud is not clearly established, and cases in which, like the instant one, the fraud appears clear, then the decisions of this court in *Rosenthal* v. *Walker* and *Traer* v. *Clews* are irreconcilable with the rule laid down in *Wood* v. *Carpenter*.

Let us consider the averments of the bill in this case in the light of these last mentioned cases and under the reason of the rule for specific allegations in a bill of complaint where a plea of laches is sought to be avoided, which is stated in *Moore* v. *Greene*, 19 How. 69, 72, to be "to enable the defendant to meet the fraud, and the alleged time of its discovery."

A reading of the complaint could not leave any question as to what was the basis of the suit against this defendant. It is clearly set forth that there was a conspiracy to defraud, and an agreement as a part of that conspiracy that the unlawfulness of the conspiracy should be kept secret; that there was a consummation of the scheme; that the first notice thereof had by plaintiff was a report of a special agent filed in the General Land Office in November, 1916. Would it have added to the defendant's certainty in answering the complaint to have alleged that the report of the special agent set forth the true facts and circumstances of the acquisition of these lands? Who could fail to infer from the allegations concerning this report that it supplied information of the facts upon which the suit is predicated?

If the further purpose of the rule is to permit the court to ascertain whether there has been laches on the part of the plaintiff in filing its suit, the same observations would be applicable.

On the point of failure to state why the fraud was not sooner discovered, what more could have been pleaded? Assuming for argument that notice to the Commissioner of the General Land Office was notice

to plaintiff, what more could be said than that he did not discover the fraud, did not have it called to his attention, and was not put in possession of any fact that would make it his duty to institute an inquiry? It is submitted that these allegations would be sufficient even as between private litigants where the rule as to the effect of notice is more exacting than it is in the case of a public official, such as the Commissioner of the General Land Office.

(c) *The United States, the party plaintiff, suing in vindication of its own rights, cannot be held guilty of laches.*

The courts below seem to have lost sight of the fact that the Government is the party plaintiff. The Court of Appeals treated the case as if it were a transaction between individuals and as "in reality a sale of lands * * for cash * *." R. 30; 254 Fed. 270. But it was on an entirely different plane.

> The Government in disposing of its public lands does not assume the attitude of a mere seller of real estate at its market value. These lands are held in trust for all the people, and in providing for their disposal Congress has sought to advance the interests of the whole country by opening them to entry in comparatively small tracts under restrictions designed to accomplish their settlement, development and utilization. And when a suit is brought to annul a patent obtained in violation of these restrictions, the purpose is not merely to regain the title but also to

> enforce a public statute and maintain the policy underlying it.
>
> *Causey* v. *United States*, 240 U. S. 399, 402.

Nor is this a case where the United States sues for the benefit of a private party and is itself merely a formal party. Hence it does not come within the rule of *United States* v. *Beebe*, 127 U. S. 338, that in such case the courts will administer the equities between the real parties without regard to exemptions in favor of the sovereign and designed for its benefit alone, and will decide such a case according to general principles governing courts of equity in like cases between private litigants.

The Government here is proceeding in its own behalf and for the benefit of no other party. That in such a case it cannot be held guilty of laches, is well settled. *United States* v. *Michigan*, 190 U. S. 379, 405.

The Circuit Court of Appeals sought to distinguish cases announcing that doctrine by holding that the applicable statute of limitations took this case out of the operation of that rule, but the whole question in this case as to whether the suit is barred by the statute of limitations under the construction given such statutes in *Bailey* v. *Glover*, and *Exploration Co.* v. *United States*, *supra*, depends upon whether the United States can be held guilty of laches in discovering its cause of action.

Now the fact that the Government has imposed upon itself a statute of limitations, does not warrant

an assertion that it is *thereby* by intendment stripped of sovereign attributes other than those which the statute, expressly or by necessary implication, destroys. In considering whether the bar of the statute should be interposed in this case, the question presented should still be determined in the presence of the fact that the sovereign does not occupy the same situation as a private litigant.

The courts below seem to have proceeded on the theory that because the Government could have made an investigation sooner it was bound to do so and its failure made it guilty of laches. But, as said by the Supreme Court of Nebraska in *Raymond* v. *Schriever*, 63 Nebraska, 719, 721:

> The test is not whether the defrauded party has the opportunity or power to discover the fraud, but whether he was in possession of such facts as were sufficient to demand an investigation, which, if pursued, would have disclosed the fraud.

And (p. 722), after referring to certain decisions:

> None of the cases holds, nor are we aware of any case elsewhere which holds, that a man must be so keenly on the scent of efforts to defraud him that, without knowledge of any fact which would lead a prudent man to suspect that he had been defrauded, he is bound to make investigations which he is not obliged to make for other purposes, merely because it is in his power to make such investigations.

The Circuit Court of Appeals expressed the view that notice to the Government was established because "at the time the lands were entered and at

the time the conspiracy to enter them was formed the coal company was in possession of the land and it has been in possession thereof ever since," * * *. R. 30; 254 Fed. 270.

This statement should not be accepted without qualification. It should not be taken as meaning that at and prior to entry the defendant company was *operating* on these lands for the production of coal. It was in possession only as the possession of its officers and the others, who were participants in the conspiracy, could be said to have been the possession of the company.

On this point the bill of complaint in making allegations of the falsity and fraudulent character of the affidavits submitted to the Land Department in support of the various applications, avers (R. 7):

> None of said entrymen were ever in possession of said lands or any mines thereon, but on the contrary all of said lands and all mines thereon then were in the possession of said conspirators, or some of them, acting for and on behalf of said defendant.

But in any event, it must be remembered that the patents were issued upon the solemn representations under oath of each entryman that he was making the entry and seeking to acquire the land solely for his own use and benefit and not in the interest of any one else, and that he was in possession of the land. In this situation, the Government had a right to rely upon the representations. It would be going far to say that the Government was obliged to doubt the truthfulness of these sworn statements, simply

because some other unknown persons were in possession. As to the occupation by the Company after final entry had been made and certificate issued, this would be entirely consistent with a clean transaction for, if the entryman had acted in good faith, he would have had a perfect right to convey the land. Pressed to its logical conclusion, the theory upon which the Circuit Court of Appeals apparently acted would result in this: that the Government, through its Land Department, ought to investigate every transaction involving the acquisition of public lands, either before the lands are patented or afterwards, to discover whether fraud was being committed in the acquisition of those lands; that it has no right to rely upon sworn representations of the validity of the application made for the lands and the good faith of the applicant. If such a duty rests upon the Government the natural inquiry would be, what would be the sense of requiring any statement or representation by the applicant?

That the Government is in a different position in cases such as this than is an individual and that it is more likely to be imposed upon, is apparent. The situation governing transactions looking toward the acquisition of public lands is so well pictured in the opinion of this court in the case of *United States* v. *Minor*, 114 U. S. 233, that we feel justified in quoting at length from it (pp. 240, 241):

> There are reasons why the government in this class of cases should not be held to the same diligence in guarding against fraud as a

private owner of real estate. The government owns millions and millions of acres of land, which are by law open to pre-emption, homestead, and public and private sale. The right and the title to these lands are to be obtained from the government only in accordance with fixed rules of law. For the more convenient management of the sale of these lands, and the establishment by individuals of the inchoate rights of pre-emption and homestead, and their final perfection in the issuing of a title, called a patent, there is established in each land district an office in which are two officers, and no more, called register and receiver. These districts often include twenty thousand square miles or more, in all parts of which the lands of the government subject to sale, pre-emption and homestead are found. These officers do not, they cannot, visit these lands. They have maps showing the location of the government lands and their subdivision into townships, sections and parts of sections, and, when a person desires to initiate a claim to any of them, he goes before them and makes the necessary statements, affidavits, and claims, of all which they make memoranda and copies, which are forwarded to the General Land Office at Washington.

For the truth of these statements they are compelled to rely on the oaths of the parties asserting claims, and such *ex parte* affidavits as they may produce.

In nine cases out of ten, perhaps in a much larger percentage, the proceedings are wholly *ex parte*. In the absence of any contesting

> claimant for a right to purchase or secure the land, the party applying has it all his own way. He makes his own statement, sworn to before those officers, and he produces affidavits. If these affidavits meet the requirements of the law, the claimant succeeds, and what is required is so well known that it is reduced to a formula. It is not possible for the officers of the government, except in a few rare instances, to know anything of the truth or falsehood of these statements. In the cases where there is no contesting claimant there is no adversary proceeding whatever. The United States is passive; it opposes no resistance to the establishment of the claim and makes no issue on the statement of the claimant.

The following excerpt from the opinion of the Circuit Court of Appeals for the Fifth Circuit in *Board of Levee Com'rs* v. *Tensas Delta Land Co.*, 204 Fed. 736, 745, is particularly apt in the present case:

> This suit does not stand altogether like a suit between private parties. The plaintiff is a public corporation, charged with the management and sale of a vast area of real estate. It is not presumed that it could exercise, under the circumstances, the same degree of diligence in guarding against fraud as a private owner of real estate. United States v. Minor, 114 U. S. 233, 240, 5 Sup. Ct. 836, 29 L. Ed. 110. Unless the plaintiff's want of diligence is such as to clearly bar its right of action, the court should be reluctant to deprive it of relief on that ground, in view of the fact that

> the suit is by a plaintiff acting in a fiduciary capacity and suing for the benefit of the public before the rights of any third party has attached which it is necessary to imperil by the suit. A defendant, who has committed a fraud involving the corruption of persons occupying a place of trust, should not be permitted to profit by it on account of the negligence of the plaintiff, unless the facts of the case and the rules of equity inexorably require it.

A suggestion was made in the opinion of the Court of Appeals to the effect that in this class of cases, involving as it does mining ground, there is the duty imposed of greater diligence because of the speculative character of the property. However apropos such a suggestion would be in the case of oil or metalliferous mining properties, it would hardly be appropriate in a case like this which involves coal lands, the value of which so far as appears of record was well known at the time of the entries. The nature of the deposits of coal, their usual uniformity, the means of ascertaining their continuity, depth and area, are such as to take coal mines out of the class of highly speculative property.

Finally, none of the factors which incline a court of conscience to refuse relief are present in this case. Witnesses are available, the right of innocent purchasers is not involved, and the situation of the parties has not materially changed.

For the purposes of the present consideration of this case, the appellee is before this court seeking by a

technical plea to escape the consequences of its admitted fraud, and endeavoring to retain the fruits of its unlawful acts secured through a conspiracy to circumvent and defy the law, in which for many years it has been successful. In this situation we cite as particularly apropos the words of Mr. Justice Story, delivering the opinion of this court in *Prevost* v. *Gratz*, 6 Wheaton, 481, 496:

> It is certainly true, that length of time is no bar to a trust, clearly established; and in a case where fraud is imputed and proved, length of time ought not, upon principles of eternal justice, to be admitted to repel relief. On the contrary, it would seem, that the length of time, during which the fraud has been successfully concealed and practised, is rather an aggravation of the offense, and calls more loudly upon a court of equity to grant ample and decisive relief.

CONCLUSION.

It follows that the decision of the Circuit Court of Appeals should be reversed and the case remanded to the United States District Court for the District of Wyoming with instructions to overrule the motion to dismiss and to enter an order requiring the defendant to answer the bill.

Respectfully submitted.

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